NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

LOUIS DENETSOSIE
ATTORNEY GENERAL

HARRISON TSOSIE
DEPUTY ATTORNEY GENERAL

November 21, 2005

Hon. Sue Ellen Wooldridge
Solicitor
United States Department of the Interior
1849 C Street, NW, Room 6352
Washington, DC 20240

RE: Navajo Nation Position Paper on Rights-of-Way over Lands Held in Trust for the Navajo Nation

Dear Solicitor Wooldridge:

I received a copy of a letter to you dated September 29, 2005 from Thomas Sansonetti, counsel for El Paso Natural Gas Company ("EPNG") and a "Memorandum of Points and Authorities" regarding rights-of-way over lands held in trust for the Navajo Nation by the United States of America.

EPNG's rights-of-way all expired on October 17, 2005. Its application for new rights-of-way was submitted to the Navajo Regional Office of the Bureau of Indian Affairs. EPNG's right to be on Navajo land terminated on October 17.

EPNG's arguments to the contrary are the same arguments that the Secretary, through the Board of Indian Appeals, rejected in 1983. See Transwestern Pipeline Co. v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 49 (1983); 43 C.F.R. § 4.1 (2005) (Office of Hearings and Appeals and its various Boards act as the "authorized representative" of the Secretary). These arguments are the same arguments that the United States Department of Justice successfully refuted in Transwestern's subsequent suit against the Secretary of the Interior. See Transwestern Pipeline Co. v. Clark, No. CIV 83-1884 HB (D.N.M.). Both the Secretary of the Interior and the Department of Justice took the position then that any grant of a right-of-way over Navajo Nation lands held in trust by the United States, without the consent of the Navajo Nation or over its objections, would be contrary to law. Copies of the Transwestern decision and the Justice Department's brief are attached for your convenience.

EPNG simply seeks to use the trustee to gain a competitive advantage over EPNG's competitors, who have agreed to terms comparable to those offered by the Navajo Nation to EPNG for its requested rights-of-way. Ironically, Transwestern is one of those competitors of EPNG that has recently reached agreement with the Navajo Nation. See "El Paso Corporation Position on Navajo Right-of-Way Negotiations," http://www.elpaso.com/about/navajo/qa.shtm (visited Oct. 10, 2005) at 2.

The Navajo Nation, of course, does not believe that granting EPNG a right-of-way over Navajo objections is in the best interest of the Navajo Nation. The Navajo Nation expects the Department of the Interior to honor the fundamental right of the Navajo Nation to condition the ability of non-members to enter and do business on the reservation, and urges the Secretary to comply with her own regulations, the federal policy promoting tribal self-determination, and the trust duty that attaches to grants of rights-of-way across trust land. See Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977); United States v. Mitchell, 463 U.S. 206, 223 (1983).

Although EPNG simply repeats arguments made unsuccessfully twenty years ago to the Secretary, we understand that the Department must treat them seriously. To assist the Department in its consideration of those arguments, I have attached a Position Paper on the requirement of Navajo Nation consent as a condition for granting rights-of-way across Navajo land. The Navajo Nation believes that the Secretary, in her capacity as trustee, should urge EPNG to promptly conclude its negotiations with the Navajo Nation by a date certain to avoid a potentially costly suit against EPNG by either the Navajo Nation or by the United States as trustee. See 25 U.S.C. §175.

Please call me if additional input or discussion is desired. Thank you for your consideration.

Sincerely,

Louis Denetsosie

Louis Denetsosie, Attorney General

xc: Craig Richardson, Esq.
EPNG General Counsel

Enclosures: (1) Transwestern Pipeline Co. v. Acting Deputy Ass't Secretary-Indian Affairs (Operations), 12 IBIA 49 (1983)
(2) Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, Transwestern Pipeline Co. v. Clark, Nos. CIV 83-1884 HB and 84-0251 (D.N.M. filed Sept. 11, 1984)
(3) Navajo Nation Position Paper on the Requirement of Navajo Nation Consent as a Condition for Granting Rights-of-Way Across Navajo Land (Nov. 2005)
(4) Appendix to Navajo Nation Position Paper on the Requirement of Navajo Consent as a Condition for Granting Rights-of-Way Across Navajo Land (Nov. 2005)

Westlaw.

12 IBIA 49, 1983 WL 41967 (I.B.I.A.)

(Cite as: 12 IBIA 49, 1983 WL 41967 (I.B.I.A.))

****1** TRANSWESTERN PIPELINE CO.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-1-A

October 28, 1983

***49** Appeal from decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations), requiring tribal consent as a prerequisite to the approval of rights-of-way across tribal land.

Affirmed.

1. Indian Lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations

In plain and unambiguous regulations codified at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land, not just those sought under 25 U.S.C. §§ 323-328 (1976).

2. Board of Indian Appeals: Jurisdiction--Regulations: Validity

The Board of Indian Appeals does not have authority to declare a duly promulgated regulation of the Department to be invalid.

3. Indian Lands: Rights-of-Way--Indian Tribes: Treaties--Rights-of-Way: Conditions and Limitations

Article IX, paragraph 6, of the Treaty with the Navajo, June 1, 1868 (15 Stat. 667), in which the tribe agreed not to oppose 'the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws ***50** of the United States,' may not be interpreted as bestowing tribal consent to all applications for rights-of-way across the Navajo Indian Reservation.

4. Indian Tribes: Treaties--Statutory Construction: Indians

Ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians.

APPEARANCES: Jeffrey B. Smith, Esq., Phoenix, Arizona, and James W. McCartney, Esq., Houston, Texas, for appellant.

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12 IBIA 49, 1983 WL 41967 (I.B.I.A.)

(Cite as: 12 IBIA 49, 1983 WL 41967 (I.B.I.A.))

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Transwestern Pipeline Company, appellant, seeks review of an August 31, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). This decision held that consent of the Navajo Nation (tribe) was a prerequisite to Departmental approval of rights-of-way across tribal land for a natural gas pipeline and radio communications tower facilities.

Background

Appellant, a Delaware corporation with its principle place of business in Houston, Texas, has been found by the Federal Power Commission (FPC; predecessor to the Federal Energy Regulatory Commission) to be a 'natural-gas company' within the meaning of the Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, 15 U.S.C. § § 717-717w (1976). [FN1] Pursuant to certificates of ***51** public convenience and necessity issued after extensive hearings by the FPC, [FN2] appellant operates a natural gas pipeline extending from the Panhandle-Hugoton area of Texas and Oklahoma and the Permian Basin area of Texas and New Mexico to pipeline facilities operated by the Pacific Lighting Gas Supply Company at the California--Arizona border, near Topock, Arizona. Appellant supplied approximately 675,000 mcf of natural gas per day to Pacific Lighting for distribution in Southern California in 1980. Present design would allow for the delivery of approximately 750,000 mcf per day.

Appellant's pipeline crosses lands held in trust by the United States for the Navajo Nation and certain individual Indians, including lands within the Navajo Indian Reservation. Appellant's 20-year right-of-way across tribal lands for the pipeline and appurtenant facilities was approved on April 24, 1961, by the Secretary of the Interior (Secretary), through his designated representative. On August 23, 1963, a second right-of-way was approved for a similar period of 20 years, with an effective date of October 5, 1961. The second right-of-way was for a radio communications tower and appurtenant facilities, used in connection with appellant's pipeline.

****2** Appellant states that on November 26, 1979, it sought extensions of the existing rights-of-way from the Navajo Nation in accordance with 25 CFR 169.19. [FN3] As evidence of its good faith and financial responsibility, appellant asserts that it deposited $140,000 with the Navajo Area Office, Bureau ***52** of Indian Affairs (BIA). When appellant heard nothing from the tribe, it sought approval of the rights-of-way directly from BIA. Each application, dated August 24, 1981, sought a 'right-of-way or renewal of right-of-way' under 'the Acts of March 11, 1904, 33 Stat. 63, March 2, 1917, 39 Stat. 973, codified at 25 U.S.C. § 321 and the Act of February 5, 1948, 62 Stat. 17 codified at 25 U.S.C. § 323' (Applications at 1).

By letter dated January 21, 1982, the Acting Navajo Area Director advised appellant that, in accordance with Departmental regulations found at 25 CFR 169.3, '[i]t is clear that the Secretary has determined that Tribal consent is a

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condition necessarily attendant to the granting of a renewal.' Section 169.3(a) states: 'No right-of-way shall be granted over and across any tribal land * * * without the prior written consent of the tribe.' The Acting Area Director's decision consequently advised appellant that its applications were being forwarded to the Navajo Nation for its consideration.

This decision was affirmed on appeal by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) by letter dated August 31, 1982. Appellant's subsequent appeal to the Board was received on October 4, 1982. In urging reversal of appellee's position that tribal consent must be obtained for the requested rights-of-way, appellant argues:

1. The statutory authority for approval of the rights-of-way in question is found in 25 U.S.C. § 321. Under this statute the Secretary has the mandatory, non-discretionary duty to process the applications without imposition of a condition of tribal consent.

***53** 2. The regulations cited by appellee as requiring tribal consent were adopted pursuant to 25 U.S.C. § 323 and are not applicable to the granting of rights-of-way sought under 25 U.S.C. § 321.

3. The consent requirement set forth in Departmental regulations may not properly be applied to the Navajo Nation as it is not an Indian Reorganization Act tribe or a tribe from which Congress has otherwise deemed consent to be required.

4. The Department's consent regulations are invalid and cannot be relied upon.

5. Assuming the Secretary has discretion to require tribal consent, appellee's action in this case conflicts with the public interest and is arbitrary, capricious, and an abuse of discretion.

6. Tribal consent to rights-of-way such as those sought here can be found in the Treaty with the Navajo, dated June 1, 1868, 15 Stat. 667.

Discussion and Conclusions

Appellant's applications for new or renewal rights-of-way were filed under two acts. [FN4] The Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. § 321 ***54** (1904 Act), authorizes the Secretary 'to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation.' The statute is silent as to whether tribal consent is required before the Secretary may grant a right-of-way. [FN5]

****3** The Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328, commonly known as the General Rights-of-Way Act of 1948 (1948 Act), provides that the Secretary 'is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any' Indian trust lands. Section

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2 of the 1948 Act, 25 U.S.C. § 324, provides that '[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under * * * [the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479] shall be made without the consent of the proper tribal officials.' As the tribe notes, the 1948 Act was intended to dispel some of the confusion that had resulted from the prior practice of enacting specific legislation dealing with each separate type of right-of-way or easement. See Tribe's Answer Brief at 3.

Regulations implementing the various statutes authorizing the granting of rights-of-way across Indian lands are found in 25 CFR Part 169. [FN6] ***55** Sections 169.1-169.21 are general provisions relating to all types of rights-of-way. Sections 169.22-169.28 deal with specific types of rights-of-way. Section 169.25 addresses rights-of-way granted for oil and gas pipelines. Subparagraph (a) states:

> The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned an Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

The section then sets forth specific requirements for pipeline rights-of-way.

[1] The Board finds that 'other pertinent sections of this Part 169' in section 169.25 refers to those general sections found in 25 CFR 169.1-169.21 that are not inconsistent with the specific provisions of section 169.25. One such section is 169.3, which clearly and unambiguously requires tribal consent before any right-of-way across tribal lands, not just one sought under 25 U.S.C. §§ 323-328, can be approved. A second section incorporated by this reference is 25 CFR 169.19, the section under which appellant sought renewals of its rights-of-way from the tribe in 1979. This section clearly states that a renewal application which does not seek a change in status or location of a prior right-of-way may be approved by the Secretary 'with the consent required by § 169.3.' An application seeking to change the prior status or location is treated as a new application, to which section 169.3 would also apply.

***56** [2] The Board therefore finds that the Secretary has, through regulation, made the policy determination to require tribal consent for any new or renewal right-of-way across tribal lands. The Board is bound by this determination because it does not have the authority to declare duly promulgated regulations of the Department to be invalid. Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).

****4** Furthermore, the same question of whether the consent requirement of 25 CFR

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169.3(a) could extend to any right-of-way across tribal lands, even when the pertinent statute was silent as to consent, was recently addressed by the Ninth Circuit Court of Appeals in Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (1983). The issue in Southern Pacific was whether tribal consent was a prerequisite to the approval of a railroad right-of-way application across the Walker River Paiute Reservation, sought under the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318. In concluding that 25 CFR 169.3(a) applied and that the Secretary had acted within his power in requiring tribal consent for the acquisition of a right-of-way under 25 U.S.C. § 312, the court stated:

The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that '[t]he concept of tribal consent as a precondition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain.' The district court also held the 1899 Act to be a grant in praesenti subject to the performance of conditions precedent and conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly specifies the conditions the Secretary must find to be satisfied ***57** prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant in praesenti. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor.

700 F.2d at 553.

The appeals court went on to observe, among other things, that the rule-making authority set forth in the 1899 Act 'would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act' (id.); that, like the General Rights-of-Way Act of 1948, the 1899 Act has as its purpose 'the preservation and protection of Indian interests' (id. at 554) and, accordingly, that the Act's provisions could be construed in light of intervening legislation such as the 1948 Act which mandates tribal consent for rights-of-way across lands owned by IRA tribes; and that the regulation in issue 'is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands' (id. at 556). [FN7]

The Ninth Circuit's opinion in Southern Pacific was rendered during the pendency of the present appeal before the Board and subsequent to the ***58** briefing period. Thus, the parties have not addressed the ruling. [FN8] Regardless of particular differences between the 1899 Act interpreted in Southern Pacific and the 1904 Act at issue here, the Ninth Circuit's opinion confirms the general principle of law that the Secretary may, by regulation, require tribal consent for rights-of-way

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other than those sought under the General Rights-of-Way Act of 1948. [FN9]

**5 Appellant also argues that, if tribal consent to the present rights-of-way is required, the Navajo Nation has already consented to this type of right-of-way by virtue of language found in the Treaty with the Navajo, June 1, 1868, 15 Stat. 667. [FN10] Appellant points to Article IX, paragraph 6, of the Treaty of 1868 in which the tribe agreed not to oppose 'the *59 construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States.' Appellant submits that its 'facilities have been determined to be works of necessity and utility by virtue of the certificates of public convenience and necessity in evidence in this matter' and that under the Treaty the tribe 'has consented or otherwise waived its consent to the construction and operation of the facilities to which Transwestern's Applications pertain and to the issuance of the requested rights-of-way' (Appeal Brief at 9). Appellant correctly observes that this argument was not discussed by the Acting Deputy Assistant Secretary in the decision under review.

Article IX, paragraph 6, of the Treaty with the Navajo is virtually identical to Article XI, paragraph 6, of the Treaty with the Sioux, April 29, 1868, 15 Stat. 635, in which the Sioux Tribe agreed not to object 'to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States.' [FN11] The Sioux treaty provision was considered in United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958), and was found not to constitute a waiver of tribal opposition to the construction of a dam and reservoir on tribal land even though the project was arguably a work of utility or necessity.

Although the treaty language relied upon by appellant has not been previously interpreted in connection with right-of-way privileges on the Navajo Reservation, the Treaty with the Navajo has been characterized by the *60 Supreme Court in general terms as an affirmation of tribal sovereignty over internal affairs of the reservation. In Williams v. Lee, 358 U.S. 217, 221-22 (1959), the Court stated:

> No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos. On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the 'Navajo nation or tribe of Indians.' At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, [31 U.S. (6 Pet.) 214 (1832)] was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. [Footnote omitted.]

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**6 Similarly, in Southern Pacific, the court found that, as a sovereign entity, the Walker River Paiute Tribe had 'independent authority to regulate the use of its own lands' (700 F.2d at 556).

[3] The Board agrees with the tribe in this case that so long as appellant chooses to do business on the Navajo Reservation, it is subject to the right of the Navajo Nation to exercise certain governmental powers over the reservation. A generalized treaty provision, such as the one found in the 1868 Treaty, is insufficient to constitute consent to any and all rights-*61 of-way, even for 'works of utility or necessity,' that might be sought through tribal lands. [FN12]

[4] This holding comports with 'the fundamental postulate, enunciated in Worcester v. Georgia, see 31 U.S. at 393, that ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians.' Santa Rosa Band v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975). See also McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973); Menominee Tribe v. United States, 391 U.S. 404 (1968).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) rendered August 31, 1982, is affirmed.

Wm. Philip Horton

Chief Administrative Judge

We concur:
Franklin D. Arness
Administrative Judge
Jerry Muskrat
Administrative Judge

FN1 All further citations to the United States Code are to the 1976 edition.

FN2 See Opinion No. 500, 36 FPC 176 (1967); Opinion No. 500-A, 36 FPC 1010 (1967); 39 FPC 676 (1968); and Docket No. CP68-181 (Feb. 4, 1969).

FN3 Departmental regulations found in 25 CFR were renumbered without substantive change on Mar. 30, 1982. See 47 FR 13327. The regulations currently in 25 CFR Part 169 previously appeared in Part 161. This opinion will use the Part 169 numbers.

FN4 Appellant has argued on appeal that its applications 'were filed primarily as a request for a new or original permit pursuant to 25 USC § 321.' See Appeal, Oct. 1, 1982, at 5. The incongruity of this position and appellant's argument that the 1948 Act is inapplicable to its pending rights-of-way applications with the actual dual filing was addressed by the tribe in its answer to appellant's

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appeal. See Tribe's Answer Brief, July 12, 1982, at 2-4.

FN5 The only reference to 'consent' found in the 1904 Act appears in the second proviso which concerns the construction of lateral lines across lands owned by individual Indian allottees.

FN6 The statutory authority for the promulgation of Part 169 is stated to be '5 U.S.C. 301; 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text.' Because it is clear that, among other acts, the 1904 Act is 'cited in the text' in 25 CFR 169.25, the Board rejects appellant's contention that Part 169 was adopted pursuant only to 25 U.S.C. §§ 323-328, and is not applicable to rights-of-way sought or granted under 25 U.S.C. § 321.

FN7 This finding upholds the legality of the regulation requiring tribal consent for all rights-of-way across tribal lands. The Secretary's adherence to a legal requirement is not 'discretionary' and cannot be arbitrary, capricious, or an abuse of discretion. The fact that the result in this case arguably conflicts with another public interest does not justify the disregard of law. The Secretary is bound by his regulations, which have the force and effect of law.

FN8 The Board notes, however, that appellant was aware of the Southern Pacific case, in which it appeared as amicus curiae.

FN9 The Walker River Paiute Tribe is organized under the IRA. Appellant argues that even if the consent requirement could be applied under acts other than the 1948 Act, it cannot be applied to the Navajo Nation, which is not organized under the IRA. This argument is based on the observation that the requirement of tribal consent appears in 25 U.S.C. § 324, which addresses IRA tribes. The Acting Deputy Assistant Secretary addressed this argument at pages 3-4 of his Aug. 31, 1982, decision:

> FNFN'ngress' policy of Indian self-determination extends to both IRA and non-IRA tribes, and the consent requirement for rights-of-way is one tool the BIA uses for advancing that policy. In addition, the consent requirement has been Departmental policy since 1951, a policy that the Department proposed abandoning in 1967. In response to this proposal, the House Committee on Government Operations recommended that '(t)he section of the present Indian right-of-way regulations (25 CFR 161.3 [now 169.3]) which requires consent of all tribes to right-of-way grants of their lands, regardless of how or whether they are organized, should be retained without modification . . .. The Secretary of the Interior should obey 25 CFR 161.3 and not grant rights-of-way in disregard of it on any pretext, even when he feels the Indians are withholding consent contrary to their own best interests.' Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H. Rept. No. 91-78, 91st Congress, 1st Session (1969). Following the committee's recommendation, the Department abandoned its plans to amend 25 CFR § 161.3 and has continued to require tribal consent to the granting of rights-of-way over tribal lands regardless of how the tribe is organized.'

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FN10 See Kappler, 2 Indian Affairs Laws & Treaties, at 1018.

FN11 See Kappler, 2 Indian Affairs Laws & Treaties, at 1002.

FN12 Cf. Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 54, 58, 90 I.D. 61, 63 (1983), reconsideration pending. The Board held that a clause in a negotiated oil and gas lease stating that the parties agreed to 'abide by any agreement for the cooperative or unit development of the field or area' constituted prior tribal consent to a communitization agreement found appropriate by the Secretary.

Interior Board of Indian Appeals

Office of Hearings and Appeals

U.S. Department of the Interior

12 IBIA 49

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

SEP 11 1984

CLERK

TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation,

Plaintiff,

v.

WILLIAM P. CLARK, Secretary of the Department of the Interior,

Defendant.

CIVIL NO. 83-1884 HB

and

THE NAVAJO NATION, a recognized Tribe of Indians,

Plaintiff,

v.

TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation,

Defendant/Third Party Plaintiff,

and

WILLIAM P. CLARK, Secretary of the Department of the Interior of the United States,

Third-Party Defendant.

CIVIL NO. 84-0251 HB

(CONSOLIDATED)

MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Secretary of the Department of the Interior, in his own right and on behalf of the United States as trustee for the Navajo Nation, moves the Court for summary judgment on all issues except damages in these two consolidated cases.

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FORM OBD-183
MAR. 83

This motion is based on the attached statement of undisputed material facts, the memorandum of points and authorities and the attached administrative record as well as documents and pleadings previously filed in this action.

Respectfully submitted,

F. HENRY HABICHT II
Assistant Attorney General

WILLIAM L. LUTZ
United States Attorney

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FORM OBD-183
MAR. 83

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation, Plaintiff, v. WILLIAM P. CLARK, Secretary of the Department of the Interior, Defendant.	CIVIL NO. 83-1884 HB
	and
THE NAVAJO NATION, a recognized Tribe of Indians, Plaintiff, v. TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation, Defendant/Third Party Plaintiff, and WILLIAM P. CLARK, Secretary of the Department of the Interior of the United States, Third-Party Defendant.	CIVIL NO. 84-0251 HB (CONSOLIDATED) STATEMENT OF UNDISPUTED MATERIAL FACTS

In support of his motion for partial summary judgment, the Secretary of the Interior through his duly appointed and authorized counsel, submits the following concise statement of material facts which are not in dispute, as required by Fed. R. Civ. P. 56 and Local Rule 9.

1. The Secretary of the Interior is the government official primarily responsible for Indian affairs including the management of Indian lands and natural resources which are held in trust by the United States for the benefit of Indian tribes and individual Indians.

2. The United States holds fee title to the Navajo reservation lands at issue in this case in trust for the benefit of the Navajo Nation and certain individual Indian allottees who hold beneficial title to their lands in severalty. (Secretary's First Amended Third Party Answer and Counterclaim, ¶¶ 49, 54, 57, Transwestern's Answer to Navajo Complaint, ¶¶ 1, 4, 6, 8).

3. Transwestern Pipeline Company operates approximately 12 miles of natural gas pipeline, with associated pumping stations and communications equipment, across lands held by the United States in trust for the Navajo Nation and certain individual allottees, located within the boundaries of the Navajo Reservation in New Mexico. Transwestern's Answer to Navajo Complaint ¶¶ 1, 10.

4. Prior to the use of these lands by Transwestern, the Navajo Nation and individual allottees were in possession and had the benefit of the use and enjoyment of these lands. Transwestern's Answer to Navajo Complaint, ¶¶ 1, 6, Affidavit of G. Denetsone, ¶ 10 (attached to Navajo Nation's Motion for Partial Summary Judgment).

5. The construction and operation of Transwestern's pipeline across these lands was authorized by a twenty-year

FORM OBD-183
MAR. 83

right-of-way permit which was granted with the consent of the Navajo Nation and individual allottees and with the approval of the Secretary of the Interior.

6. The twenty-year term of the right-of-way permit expired on October 15, 1979. Transwestern's Answer to Navajo Complaint, ¶¶ 1, 12, 15; Denetsone Aff. ¶ 7.

7. On or about November 26, 1979, Transwestern submitted an application for the renewal of its right-of-way permit to the Acting Area Director, Navajo Area Office of the Bureau of Indian Affairs.

8. Thereafter, on January 21, 1982, the Acting Area Director, Navajo Area, Bureau of Indian Affairs, advised Transwestern that Navajo tribal consent is a condition precedent to the granting of a renewal of the right-of-way across tribal land. See copy of letter dated January 21, 1982, Administrative Record at 104. See also Transwestern's Third Party Complaint, ¶ 16.

8. Transwestern appealed the Acting Area Director's decision requiring tribal consent to the Acting Deputy Assistant Secretary of Indian Affairs (Operations), who by letter dated August 31, 1982, affirmed the decision of the Acting Area Director. Transwestern's Third Party Complaint, ¶ 18; Administrative Record at 48.

9. Transwestern thereafter appealed this decision to the Interior Board of Indian Appeals (the Board). By decision dated October 28, 1983, the Board affirmed the previous decisions upholding tribal consent as a prerequisite to the approval of

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rights-of-way across tribal land. Transwestern's First Amended Complaint in No. 83-1884 at ¶¶ 20, 21 and Exhibit A. 12 IBIA 49, Administrative Record at 2-14.

10. The Board's decision was final agency action and the review of that decision is the subject matter of Transwestern's complaint in No. CIV 83-1884 HB and Transwestern's Third Party Complaint on No. CIV 84-0251 HB.

11. Transwestern has been in continuous exclusive possession of that portion of the Navajo lands covered by the permit since the expiration of the permit term. Transwestern's Answer, ¶ 13; Denetsone Affidavit ¶ 8.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation, Plaintiff, v. WILLIAM P. CLARK, Secretary of the Department of the Interior, Defendant.	CIVIL NO. 83-1884 HB
	and
THE NAVAJO NATION, a recognized Tribe of Indians, Plaintiff, v. TRANSWESTERN PIPELINE COMPANY, a Delaware Corporation, Defendant/Third Party Plaintiff, and WILLIAM P. CLARK, Secretary of the Department of the Interior of the United States, Third-Party Defendant.	CIVIL NO. 84-0251 HB (CONSOLIDATED) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

The Secretary of the Interior has moved the Court for summary judgment on all issues except damages in this case. This memorandum is in support of that motion.

Introduction

Although the pleadings in this consolidated case are somewhat complex, 1/ the major legal issues are straightforward. Moreover, as set forth in the attached Statement, there are no material facts at issue in this case. Quite simply, Transwestern obtained a 20-year right-of-way, with the consent of the Navajo Nation (Tribe) and the approval of the Secretary of the Interior (Secretary), which expired in 1979. Transwestern applied to the Department of the Interior for a renewal of its right-of-way but failed to obtain the consent of the Tribe to such renewal, as required by federal law. Accordingly, the Secretary, through his designated representatives, refused to approve a right-of-way renewal without the consent of the Tribe. Transwestern is challenging the Secretary's decision as well as the underlying regulations, 25 C.F.R. Part 169 (1983). These regulations were first codified in 1951 and reflect longstanding Interior Department policy requiring the consent of the affected Indian tribe or individual Indians for conveyances of interests in their lands.

In addition to the judicial review action, No. CIV 83-1884 HB, the Navajo Nation has filed an action against

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1/ In an effort to keep the parties straight, we have refrained from denominating parties as "plaintiff", "defendant-third party plaintiff", and so forth. Rather, we will refer to Transwestern Pipeline Company as "Transwestern", the Navajo Nation as "Nation" or "Tribe", the individual Navajo Indians holding lands in severalty as "allottees" and William P. Clark, Secretary of the Interior as "the Secretary."

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Transwestern seeking declaratory relief, ejectment and damages for Transwestern's unpermitted continued use and occupation of the right-of-way since the original permit expired in 1979. No. CIV 84-0251 HB. Transwestern filed a Third Party Complaint against the Secretary alleging many of the same matters as in No. CIV 83-1884 HB, and indeed the first two counts in each pleading are the same. However, there are some slightly different allegations in the two complaints and we will address the legal issues raised by each allegation in turn.

Finally, in addition to answering the complaint and third party complaint in these actions, the United States has moved to dismiss the condemnation claim set forth in the Fourth Count of the Third Party Complaint and, in addition, has filed an amended answer and counterclaim against Transwestern for declaratory relief and damages for Transwestern's unauthorized use and occupancy of the right-of-way since the expiration of the right-of-way permit in 1979. The Secretary incorporates the motion to dismiss by reference in this motion, and respectfully requests the Court to consider it as a motion to dismiss or alternatively as a motion for partial summary judgment.

With this procedural background in mind, we can now turn to the legal issues raised by these two consolidated cases.

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ARGUMENT

I

THE SECRETARY'S LONGSTANDING PREREQUISITE OF TRIBAL CONSENT TO THE GRANTING OF RIGHTS-OF-WAY ACROSS TRIBAL TRUST LANDS IS LAWFUL, REASONABLE AND WITHIN HIS DISCRETION

By its complaint in No. 83-1884 HB and third party complaint in No. 84-0251 HB Transwestern seeks judicial review of the Secretary's longstanding requirement of tribal consent as a prerequisite to applications for renewal of rights-of-way, 25 C.F.R. § 169.19 (1983), as well as applications for new rights-of-way. 25 C.F.R. § 169.3 (1983). 2/ Transwestern also seeks relief in the nature of mandamus on the theory that the Secretary has a mandatory non-discretionary duty to approve applications for renewals of rights-of-way. We will address these arguments in the following paragraphs.

A. Transwestern Fails To State A Valid Claim For Mandamus.

Transwestern seeks declaratory relief and a writ of mandamus directing the Secretary to perform certain alleged duties. Jurisdiction for the writ of mandamus is alleged to be 28 U.S.C. § 1361 which provides that,

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2/ Transwestern obtained Navajo tribal consent and thus complied with this requirement when it applied for the first right-of-way permit which has now expired.

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> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Mandamus is, of course, a "drastic [remedy] to be invoked only in extraordinary circumstances." Allied Chemical Corporation v. Daiflon, Inc., 449 U.S. 33, 34 (1980).

The Court of Appeals for the Tenth Circuit has recently stated the prerequisites for mandamus:

> For mandamus to issue there must be: (1) a clear right in the plaintiff to the relief sought; (2) a plainly defined and preempting duty on the part of the defendant to do the action in question; and (3) no other adequate remedy available.

Hadley Memorial Hospital, Inc. v. Schweiker, 689 F.2d 905 (10th Cir. 1982) (citations omitted).

None of the requisite elements for mandamus is present here. First, as discussed in more detail below, Transwestern does not have a clear right to relief in the nature of forcing the Secretary to approve an application for a right-of-way renewal across Navajo tribal land without the consent of the Tribe. Indeed, the pertinent statutory authority as well as the Secretary's longstanding regulations clearly permit, if not require, tribal consent for such a conveyance of an interest in tribal lands. Second, the Secretary's alleged duty to approve such an application without tribal consent is far from "plainly defined and preemptory." As discussed in detail

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below, neither the Act of March 11, 1904, 33 Stat. 63 as amended by Act of March 2, 1917, 39 Stat. 973 jointly codified at 25 U.S.C. § 321 (1904 Act), the Act of February 5, 1948, 62 Stat. 17, codified at 25 U.S.C. § 323-328, 1948 Act nor the Treaty with the Navajos, June 1, 1868, 15 Stat. 667 (1868 Treaty) plainly require the Secretary to grant Transwestern's application. On the contrary, those authorities permit the Secretary's imposition of the condition of tribal consent. Finally, Transwestern has failed to demonstrate the unavailability of other adequate relief. On the contrary, Transwestern cites the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 552, 553, and 701-706 as authorizing the relief sought. Mandatory injunctive relief is available under the APA to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), and it is pursuant to that statute that Transwestern must seek relief. Accordingly, mandamus relief is not available in this case under 28 U.S.C. § 1361. Allied Chemical, supra, 449 U.S. at 35; Nova Stylings, Inc. v. Ladd, 695 F.2d 1179, 1180-1182 (9th Cir. 1983) (writ of mandamus is precluded where adequate remedy exists under the Copyright Act and the Administrative Procedure Act).

We shall now turn to the provisions of the APA as they apply to this case.

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B. Judicial Review.

1. Standard of Review.

Transwestern seeks declaratory and injunctive relief invalidating the Secretary's duly promulgated regulation requiring tribal consent as a prerequisite for Secretarial approval of rights-of-way permits, and compelling the Secretary to approve Transwestern's application. The standard of review for such an action is set forth at 5 U.S.C. § 706 which provides in pertinent part that,

* * * * *

> The reviewing court shall --
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings and conclusions found to be --
> (A) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law
>
> * * * * *
>
> (C) in excess of statutory jurisdiction or authority or limitations, or short of statutory right
>
> * * * * *

As there were no factual matters at issue in the proceedings before the Secretary of the Interior, the agency action to be reviewed is the Secretary's longstanding requirement of tribal consent imposed on Transwestern as well as all other applicants for rights-of-way across Indian land. The scope of review, therefore, is whether that requirement of tribal consent is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or in excess of statutory authority.

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2. Burden of Proof.

It is well settled that the burden of proof in an action challenging administrative action or regulations is upon the entity challenging such actions. Smith v. Prokop, 496 F.Supp. 861, 863- 864 (D. Ohio 1980); Air Transport Ass'n. of America v. Federal Energy Office, 382 F.Supp. 437, 453 (D.C. D.C. 1974) aff'd 520 F.2d 1339 (D.C. Cir. 1975); Gables by the Sea, Inc. v. Lee, 363 F.Supp. 826 (D. Fla. 1973) aff'd 498 F.2d 1340, cert. den. 419 U.S. 1105 (1975). Therefore, to the extent that there are any factual issues in this case, Transwestern bears the burden of such issues, including proving that the Secretary's actions and regulations requiring tribal consent are invalid.

In addition, to the extent Transwestern claims an interest in Indian land held in trust by the United States, it bears the burden of proving valid title where as here it is clear that the Navajo Tribe and individual Indians have previously owned or possessed the land in question. 25 U.S.C. § 194. See Statement of Material Fact Number 4.

3. The Secretary's Longstanding Tribal Consent Requirement is Lawful, Reasonable and Within his Discretion Under Both the 1904 Act and the 1948 Act.

The decision of the Interior Board of Indian Appeals upholding the tribal consent requirement was lawful, reasonable and fully supported by statutory authority and longstanding regulations and should itself be affirmed. Transwestern's contentions against requiring consent in this case fail to state a claim for which relief can be granted and Transwestern's claims in this case should be dismissed.

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Transwestern's first count in both its First Amended Complaint as well as its Third Party Complaint assert that the Board's decision was arbitrary, capricious and not in accordance with the law because 1) the consent regulation is not valid as it applies to new applications for rights-of-way under the 1904 Act, 3/ and 2) the consent requirement is not valid under the 1948 Act 4/ as to tribes such as the Navajo which are not organized under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479. See Transwestern's First Amended Complaint, ¶¶ 28-34. Both arguments were raised before the Board and properly rejected.

Transwestern's argument that it need not obtain tribal consent for applications for pipeline rights-of-way filed pursuant to the 1904 Act is inconsistent with the express terms of that Act as well as with the all inclusive nature of the 1948 Act and the regulations interpreting both statutes. The 1904 Act was one of many scattered statutes dealing with various types of rights-of-way across Indian lands. As codified at 25 U.S.C. § 321, it provides in pertinent part that,

> The Secretary of the Interior is authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipelines

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3/ Act of March 11, 1904, 33 Stat. 65 as amended March 2, 1917, 39 Stat. 973, codified at 25 U.S.C. § 321.

4/ Act of February 5, 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323-328 (also referred to as the General Right of Way Act).

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> for the conveyance of oil and gas through any Indian reservation * * * or through lands allotted in severalty to any individual Indian under any law or treaty * * *.

The Secretary is not mandated or required to grant a right-of-way permit, but simply is "authorized and empowered" to issue such right-of-way in his discretion. The statute further provides that maps of definite location of the pipeline must be filed and approved by the Secretary, that the Secretary may promulgate regulations and conditions for temporary right-of-way permits, approve compensation paid to tribes or individual allottees, impose an annual tax to be paid to the Secretary for the use and benefit of the Indians, and upon expiration extend the right-of-way period up to an additional twenty years "upon such terms and conditions as he may deem proper." Thus, under the express terms of this statute, the Secretary is under no duty to grant rights-of-way upon application, but rather is vested with discretion to establish numerous conditions for the benefit of the Indians. See Southern Pacific Transp. Co. v. Watt, 700 F.2d 550, 553-54 (9th Cir. 1983) cert. den. ___ U.S. ___, 104 S.Ct. 393 (1984). 5/ The prerequisite of tribal consent is just such a condition, especially in light of the "eminently sound and vital canon * * * that statutes passed for the benefit

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5/ In Southern Pacific the Ninth Circuit upheld the Secretary's consent requirement against a challenge that the Act of March 2, 1890, 30 Stat. 990 (codified at 25 U.S.C. § 312-318) was a grant of a right-of-way in praesenti.

of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (citations omitted).

In addition, the 1904 Act specifically provides, "that the Secretary of the Interior at the expiration of said twenty years, may extend the right to maintain any pipeline constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper." 25 U.S.C. § 321 (emphasis added). Thus, the Secretary is specifically vested with discretion to impose conditions on right-of-way renewals such as Transwestern's application in the instant case. One condition which the Secretary has deemed proper is tribal consent. 25 C.F.R. §§ 169.3, 169.19. Thus, even examining Transwestern's arguments solely in light of the 1904 Act, it is clear that the Secretary has authority and discretion to impose conditions such as tribal consent as prerequisites to approval of applications for pipeline rights-of-way permits or renewals of such permits.

Even if the 1904 Act were ambiguous as to the Secretary's authority to impose conditions such as tribal consent, the General Right of Way Act of 1948, 62 Stat. 17, codified at 25 U.S.C. §§ 323-328 clearly empowers the Secretary of the Interior, "to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across

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any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes * * *." 25 U.S.C. § 323 (emphasis added). The requirement of obtaining the consent of the Indians, who are actually the beneficial owners of the land, is one condition which the Secretary has prescribed. 25 C.F.R. §§ 169.3, 169.19.

The 1904 Act and the 1948 Act cannot of course be read in isolation from the other. Rather, the two statutes must be read in pari materia because the 1948 Act was designed to constitute a comprehensive scheme for granting rights-of-way across Indian lands and to simplify and unify the earlier procedures and dispel some of the confusion that had resulted from the prior practice of enacting specific legislation dealing with each separate type of right-of-way or easement. See S. Rept. No. 823, January 14, 1948, reprinted in 1948 U.S. Code Cong. Service 1033, 1034-1036; Plains Electric Gen. and Transmission Co-op. v. Pueblo of Laguna, 542 F.2d 1375, 1379-1381 (10th Cir. 1976); Southern Pacific Transp. Co. v. Watt, supra 700 F.2d at 553-554. Indeed, the only reason for preserving the existing statutory authority for specific types of rights-of-way was, "to avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new." 1948 U.S. Code Cong. at 1036. Thus, the 1948 Act effectively supplanted the earlier right-of-way statutes which are accordingly intended to be construed in light of the later 1948 Act. Read together, the requirement of tribal consent is quite proper.

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Indeed, the regulations governing rights-of-way, 25 C.F.R. Part 169 (1983), establish a unified procedure for applying for rights-of-way, whether for pipelines or other purposes. The regulations were first promulgated on August 25, 1951, 16 Fed. Reg. 8578, and were designed to implement and harmonize the 1948 General Right of Way Act with the myriad other right-of-way statutes including the 1904 Act, as well as codifying past Interior policy. The pertinent consent requirements have been virtually unchanged 6/ since that time and reflect a longstanding policy of requiring tribal consent. The longstanding interpretation of these statutes by the agency charged with its enforcement or administration should be accepted by the courts if such interpretation is reasonable, Udall v. Tallman, 390 U.S. 1, 17-18 (1965); Rocky Mountain Oil and Gas Association v. Watt, 696 F.2d 734, 745 (10th Cir. 1982), and should not be overturned unless it is plainly erroneous. Board of Directors and Officers, Forbes Federal Credit Union v. National Credit Union Administration, 477 F.2d 777, 784 (10th Cir. 1973). The requirement of tribal consent for all tribes is manifestly reasonable and should not be overturned.

6/ The regulations presently codified at 25 C.F.R. Part 169 were previously codified under other parts of 25 C.F.R. but have not been substantively changed. See e.g. 25 C.F.R. Part 256 (1952); 25 C.F.R. Part 161 (1981).

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4. The Secretary's Requirement of Tribal Consent from all Tribes Whether Organized Under the Indian Reorganization Act or Not is Lawful, Reasonable and Approved by Congress.

Transwestern also argues that the consent requirement of the 1948 Act only applied to tribes organized under the Indian Reorganization Act (IRA) and that the Secretary was not authorized to require tribal consent from tribes which are not organized under that statute. This argument is also without merit and was properly rejected by the Board.

While the 1948 Act specifically requires the consent of an IRA tribe to the granting of a right-of-way across tribal land, it does not preclude the Secretary from requiring such consent fron non-IRA tribes. 7/ On the contrary, the 1948 Act clearly authorizes the Secretary to grant rights-of-way across the lands of all tribes, "subject to such conditions as he may prescribe." 25 U.S.C. § 323. Thus, while the Secretary must require tribal consent for an IRA tribe, the Secretary is vested

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7/ Although the legislative history of the 1948 Act is not entirely clear as to why consent was not specifically required for all tribes, the Senate Report does include a letter from the Under Secretary of the Interior, dated July 22, 1947, which explains that, "[t]he bill preserves the powers of those Indian tribes organized under the Indian Reorganization Act * * *." S. Rept. No. 823 supra 1948 U.S. Code Cong. Service at 1036. Another Congressional committee has expanded on this explanation by noting that, "the purpose of including the consent requirement for organized tribes was merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act." House Committee on Government Operations, Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H. Rept. No. 91-78, 91st Cong., 1st Sess. (1969) at 9.

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with discretion to require tribal consent and any other conditions for rights-of-way across lands of all tribes, regardless of their IRA status. 8/

Furthermore, Congress has been made aware of the consent requirement as applied by the Secretary to all Indian tribes. At one time the Secretary proposed limiting the tribes' consent power to only IRA tribes, as identified in 25 U.S.C. § 324. This proposal generated a Congressional report which strongly rejected the Secretary's proposal, and recommended that the Secretary enforce the consent requirement as to all Indian tribes. 9/ House Committee on Government Operations,

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8/ As the legislative history indicates, the Department of the Interior was the principle proponent of the 1948 Act.. While not expressed in the published legislative history, it is likely that Interior wanted to retain discretion in requiring consent from non-IRA tribes because of the difficulties in obtaining consent from tribes with no formal government. This problem is not present with a tribe such as the Navajo Nation which although not organized under the IRA, has a formal government empowered to consent to conveyances of real property.

9/ The Committee concluded, Report at 3, as follows:

> 6. The committee believes that the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.
>
> 7. The committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

The Committee also noted that prior to the issuance of this report, the Department of the Interior had required tribal consent for rights-of-way across the Navajo Reservation for projects including Glen Canyon Dam and a thermal electric power plant and related facilities. Report at 7-8.

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Disposal of Rights in Indian Tribal Lands Without Tribal Consent. H. Rept. No. 91-78, 91st Cong., 1st Sess. (1969) at 304. The Committee explained, at 9, that

> The legislative history of the 1948 Indian Right-of-Way Act, however, shows no congressional intent that consent ought not be sought from unorganized tribes. The purpose of including the consent requirement for organized tribes was merely to prevent implied supersession of the Indian Reorganization Act and the Oklahoma Indian Welfare Act. See Senate Report 823, 80th Congress, Second Session.

Although a House Committee report does not constitute the intent of Congress as a whole, a consistent administrative interpretation of a statute, shown to have been brought to the attention of Congress and not changed by that body, is strong evidence that the administrative interpretation has Congressional approval. Bob Jones University v. United States, ___ U.S. ___, 103 S.Ct. 2017, 2032-2034 (May 24, 1983).

Consequently, the consent requirement is valid as applied to non-IRA tribes as well as those organized under that Act.

5. The 1868 Treaty does not Provide Navajo Tribal Consent to Transwestern's Natural Gas Pipeline.

As the second count of its First Amended Complaint as well as its Third Party Complaint, Transwestern asserts that Article IX of the 1868 Treaty with the Navajo, 15 Stat. 667 (July 25, 1968) provides tribal consent to the reissuance of Transwestern's natural gas pipeline permit. In light of the

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context of the Treaty and the canons of treaty construction, as well as subsequent Congressional enactments and Transwestern's own actions in seeking and obtaining tribal consent for the original right-of-way, it is apparent that this legal theory is also without merit.

The treaty language at issue is found in Article IX, ¶ 6 of the 1868 Treaty. 10/ Transwestern apparently interprets

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10/ Article 9 reads as follows:

> Article 9. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:
>
> 1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.
>
> 2d. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.
>
> 3d. That they will not attack any persons at home or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.
>
> 4th. That they will never capture or carry off from the settlements women or children.
>
> 5th. They will never kill or scalp white men, nor attempt to do them harm.

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Paragraph Six as providing blanket consent to "works of utility or necessity which may be ordered or permitted by the laws of the United States." Transwestern argues that by virtue of certificate of public convenience and necessity issued by the Federal Energy Regulatory Commission, its pipeline facilities fall within that provision. The Board correctly rejected this tenuous legal theory and found that the 1868 Treaty was not a waiver of tribal consent but rather was an affirmation of tribal sovereignty and authority over internal affairs including land use. 12 IBIA at 59-60.

In interpreting treaty language we must be guided by the "eminently sound canons" that treaties are to be interpreted as the Indians themselves would have understood them. Washington v. Washington State Commerial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 676 (1979); Worcester v. Georgia, 31 U.S. (6

> 6th. They will not in future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head-man of the tribe.
>
> 7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

15 Stat. at 669-670.

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[Pet.) 515, 553 (1832). They must not be read in isolation but in light of the common notions of the day and the assumptions of those who drafted them. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). Furthermore, treaties are to be interpreted so as to promote their central purposes, United States v. Winans, 198 U.S. 371, 381 (1905) and ambiguous expressions are to be resolved in favor of the Indians. Winters v. United States, 207 U.S. 564, 571 (1908).

In the instant case it is clear that the 1868 treaty does not provide the requisite consent. In the first place, when paragraph six of Article IX is viewed in context "it becomes clear that this portion of the Treaty was concerned with a cessation of armed hostility on the part of the Tribe." Kerr-McGee Corp. v. Navajo Tribe of Indians, 731 F.2d 597, 600 (9th Cir. 1984) (holding that paragraph six does not bar tribal taxation of non-Indian oil and gas operations on the Reservation). See also United States v. 2,005.32 Acres of Land, 160 F.Supp. 193, 201 (D. S.D. 1958) dismissed as moot 259 F.2d 271 (8th Cir. 1958) (holding identical paragraph in 1868 Sioux Treaty as not waiving tribal opposition to the construction of a dam and reservoir on tribal land); Bennett County South Dakota v. United States, 394 F.2d 8, 15 (8th Cir. 1968) (state highway right-of-way). The other purposes in Article IX contain promises not to attack settlers or interfere with wagon trains, railroads and so on. Second, the Navajo Nation could never have understood the terms of the treaty to

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include natural gas pipelines operated by private entities and licensed by FERC since neither natural gas pipelines nor the federal agency were in existence in 1868. Third, the interpretation of the federal government, which negotiated the 1868 Treaty, has continuously been that the Treaty does not provide such consent. If it had, Congress would not have needed to enact the 1904 Act or the 1948 Act nor other special legislation in order to allow such pipelines, and could have exempted the Navajo from the consent requirement. Even Transwestern itself has sought and obtained Navajo tribal consent for its pipelines, as have all other pipeline companies, railroads and other entities with certificates of public convenience and necessity from various federal and state agencies. Furthermore, Transwestern's interpretation of Article IX is completely at odds with the central purposes of the 1868 Treaty which was to secure the benefits of peace and provide the Navajo Tribe with a "permanent home" set apart from non-Indian settlers, the internal affairs of which remain "exclusively within the jurisdiction of whatever tribal government existed." Williams v. Lee, 358 U.S. 217, 221-22 (1959). See also, Southern Pacific, supra, 700 F.2d at 556.

Finally, even if the Navajo Nation did grant a blanket consent to "works of utility and necessity," Transwestern's pipeline does not fall within the terms of the treaty because, without full compliance with federal law including the consent requirement, the pipeline is not "ordered or permitted by the laws of the United States." A certificate of public convenience

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and necessity issued by the FERC may indicate compliance with the laws administered by that agency, but not necessarily with laws administered by other agencies, including land management agencies such as the Department of the Interior.

Accordingly, Transwestern's second count fails to state a claim upon which relief may be granted and should be dismissed.

6. Transwestern Failed to Exhaust Administrative Remedies with Respect to Allotted Lands.

In the third and final count of its First Amended Complaint, Transwestern asserts that the Secretary has a mandatory, non-discretionary duty to approve the right-of-way across lands held by individual Indians in severalty. This is simply not the case. The Secretary has discretion to disapprove rights-of-way even where the applicant has obtained the consent of the individual owners as required by 25 C.F.R. § 169.3(c). For example, the Secretary's approval may be withheld where tribal consent was fraudulently obtained or the right-of-way application otherwise fails to comply with applicable law. See 25 C.F.R. § 169.15, 169.20.

The threshold issue with Transwestern's claim, however, is that it has not yet asked the Secretary or his representative to approve the right-of-way application with respect to the allottees. It may be that if the applications are in order, complete with the consent of the individual Indian owners, the Secretary may approve the applications separate and apart from the applications across tribal land. Until the issue has been

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p s t ecretary and a final decision issued by him, this issue is not ripe for judicial review. See Woelke and Romero Framing Inc. v. NLRB, ___ U.S. ___, 102 S.Ct. 2071, 2083 (1982). See generally 4 Davis, Administrative Law Treatise, § 26.7 (1983).

7. The Secretary has no Duty Under the 1868 Treaty or Otherwise to Assure Continuation of Transwestern's Pipeline or Determine Damages.

As the third count of its Third Party Complaint, Transwestern asserts that the Secretary has a mandatory duty under the 1868 Treaty to assure the continued operation and maintenance of Transwestern's pipeline, and must oppose the Tribe's claim for ejectment. This allegation is nowhere supported in the 1868 Treaty, or elsewhere. Indeed, as discussed above, without tribal consent, the Secretary may not approve a right-of-way application. The Secretary owes no duty to Transwestern whether mandatory or discretionary.

Transwestern further contends that the 1868 Treaty, presumably Article IX, ¶ 6, requires the Secretary to appoint three disinterested commissioners to determine whatever amount of damages should be paid to the Tribe. This theory is also unsupported, because that paragraph refers only to works constructed by the government across tribal lands, for which, "the Government will pay the tribe whatever amount of damages

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presented to the Secretary and a final decision issued by him, this issue is not ripe for judicial review. See Woelke and Romero Framing Inc. v. NLRB, ___ U.S. ___, 102 S.Ct. 2071, 2083 (1982). See generally 4 Davis, Administrative Law Treatise, § 26.7 (1983).

7. The Secretary has no Duty Under the 1868 Treaty or Otherwise to Assure Continuation of Transwestern's Pipeline or Determine Damages.

As the third count of its Third Party Complaint, Transwestern asserts that the Secretary has a mandatory duty under the 1868 Treaty to assure the continued operation and maintenance of Transwestern's pipeline, and must oppose the Tribe's claim for ejectment. This allegation is nowhere supported in the 1868 Treaty, or elsewhere. Indeed, as discussed above, without tribal consent, the Secretary may not approve a right-of-way application. The Secretary owes no duty to Transwestern whether mandatory or discretionary.

Transwestern further contends that the 1868 Treaty, presumably Article IX, ¶ 6, requires the Secretary to appoint three disinterested commissioners to determine whatever amount of damages should be paid to the Tribe. This theory is also unsupported, because that paragraph refers only to works constructed by the government across tribal lands, for which, "the Government will pay the tribe whatever amount of damages

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may be assessed by three disinterested commissioners." To hold that it would require the government to appraise damages caused by private entities who continue to use and occupy tribal lands without tribal consent, is not supported by the text of the Treaty.

8. Transwestern's Condemnation Claim is Barred by Sovereign Immunity.

In the United States' motion to dismiss the fourth count of the Third Party Complaint, we noted that among other things the sovereign immunity of the federal government precludes Transwestern's condemnation claim here. The Secretary relies on that motion and supporting memoranda and incorporates them by reference here.

II

TRANSWESTERN'S CONTINUED USE AND OCCUPANCY OF THE RIGHT-OF-WAY WITHOUT THE CONSENT OF THE NAVAJO NATION OR APPROVAL OF THE SECRETARY IS UNLAWFUL AND TRANSWESTERN IS LIABLE FOR DAMAGES FOR SUCH USE AND OCCUPANCY

The undisputed facts and the foregoing legal discussion demonstrate that since the expiration of its original right-of-way permit in 1979, Transwestern has been trespassing on lands held by the United States in trust for the Navajo Tribe and individual Indians. Transwestern's continued use and occupancy has deprived the Navajo Tribe and its members of the use and enjoyment of their lands without compensation, and Transwestern is liable for damages for such continuing trespass. See e.g. United States v. Santa Fe Railroad Co., 314 U.S. 339, (1941);

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Utah Power and Light Co. v. United States, 243 U.S. 389, 411 (1917). Accordingly, the counterclaim for trespass and damages should be granted. 11/

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court grant his motion for partial summary judgment, dismiss all of Transwestern's claims against the Secretary in their entirety, and hold Transwestern liable for trespass and damages in an amount to be proved at trial.

Respectfully submitted,

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11/ Since Transwestern has not, as of this writing, filed an answer to the Secretary's counterclaim, we do not attempt to anticipate any defenses which Transwestern may wish to raise. We do reserve the opportunity to address any such defenses at an appropriate time in our briefing.

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